163 U.S. 556

TRANSCRIPT OF RECORD.

163 - 556

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 225.

HORACE WIGGIN AND A. E. WIGGIN, PLAINTIFFS IN ERROR,

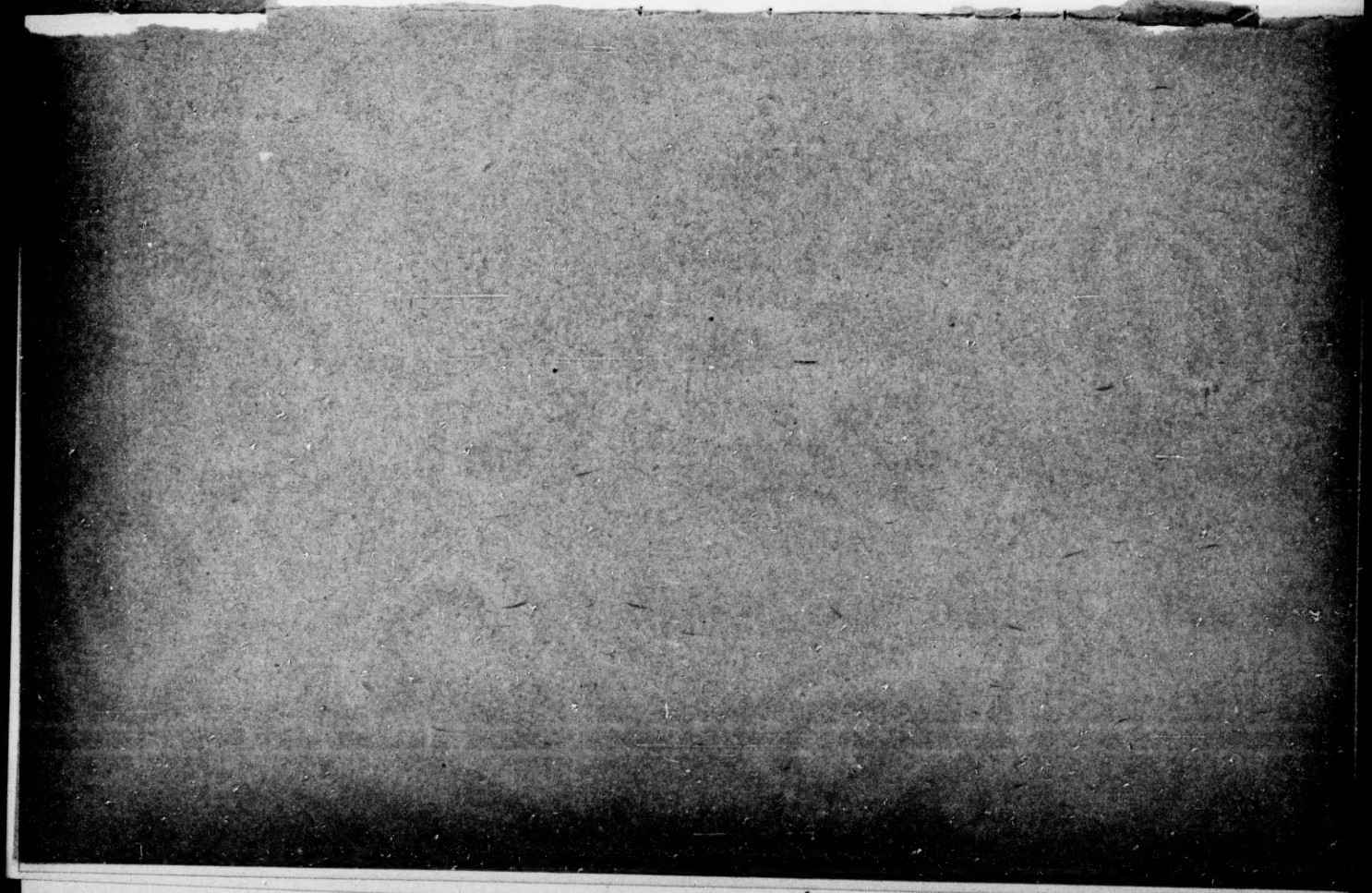
vs.

ESTHER KING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED APRIL 8, 1893.

(15,291.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 26, 1895.

1 In the Supreme Court of the United States.

A. E. WIGGIN, Appellant,
vs.
ALEXANDER CONOLLY and JOHN KING, Appellees.

Now comes the appellant, A. E. Wiggin, and shows to the court that he was a plaintiff in error in the case of H. A. Wiggin and A. E. Wiggin, plaintiffs, against Esther King, defendant in error, in the supreme court of the State of Kansas, a transcript of the record in which cause is hereto attached; that there is error in the proceedings in said cause in said court in this, to wit, that the said court affirmed the judgment of the district court of Franklin county when it should have reversed the same; that the said supreme court of Kansas erred in said cause in holding that under the restrictions contained in the treaties of *of* 1862 and 1867 between the United States and the Ottawa Indians the lands of a minor could not be sold by a guardian appointed in a probate court of said State and proceeding to make such sale in accordance with the laws of said State. At the time when said judgment was rendered in said supreme court this appellant was a minor, and he has not attained his majority until within less than two years last past; that the said Esther King died since the determination of said cause, and, the appellees herein being her heirs and representatives, said cause has been duly revived against them.

2 Wherefore appellant prays that the said judgment of the supreme court of Kansas be reversed, set aside, and held for naught, and that he may be restored to all which he lost by reason thereof.

H. C. MECHEM,
Att'y for Appellant.

STATE OF KANSAS, } *ss:*
Lyon County, }

Jno. H. Wiggam, being first duly sworn, says that he is the brother and agent for the foregoing appellant, and that the allegations of the foregoing assignment of errors are true.

JOHN H. WIGGAM.

Subscribed and sworn to before me this 20th day of June, 1892.

[Seal E. W. Cunningham, Notary Public, Lyon County, Kans.]

E. W. CUNNINGHAM,
Notary Public.

My com'n expires Jan. 5th, 1895.

Filed Jun- 20, 1892.

C. J. BROWN,
Clerk Sup. Court.

[Endorsed:] A. E. Wiggin *vs.* Alex. Conolly *et al.* Assignment of errors. H. C. Mechem, att'y.
1—225

3 In the Supreme Court of the State of Kansas.

HORACE WIGGAN and ALBERT E. WIGGAN, Plaintiffs in Error,
vs.
ESTHER KING, Defendant in Error.

Be it remembered that on the 31st day of January, 1885, there was filed in the office of the clerk of the supreme court of the State of Kansas a case made in the above-entitled cause, with petition in error attached thereto and waiver of summons in error endorsed thereon from the district court of Franklin county, Kansas, which are in the words and figures as follows, to wit:

4 In the Supreme Court of the State of Kansas.

HORACE WIGGAN and ALBERT E. WIGGAN, Plaintiffs in Error,
vs.
ESTHER KING, Defendant in Error.

Error from Franklin county.

Petition.

The plaintiffs in error say that on the 17th day of February, 1881, the defendant in error began an action in the district court of Franklin county, Kansas, against the plaintiffs in error to recover the possession of the south half of the northeast quarter of section 23, of township sixteen, of range nineteen, in said county of Franklin.

That said action came on duly to be tried at the May term, 1884, on May 24, 1884, and upon said trial the court rendered its judgment in favor of the plaintiff in said action and against the defendants therein, decreeing that the plaintiff therein have and recover from the defendants therein the possession of the real estate aforesaid, and that the plaintiff recover from the defendants therein the costs of said action, being $—; and the plaintiffs in error allege that the court erred upon the trial aforesaid and in the subsequent proceedings therein, in this, to wit:

1. The court erred in excluding proper evidence offered by the defendants therein material to the cause.

2. The court erred in rendering judgment in favor of the plaintiffs in said action and against the defendants.

3. The court erred in overruling the motion of the defendants in said action for a new trial.

The errors aforesaid fully appear in the case made, hereto attached and filed herewith.

Wherefore the plaintiffs in error pray the court to reverse the judgment aforesaid, and that they may be granted a new trial of said action and may have judgment for their costs herein expended.

H. C. MECHEM,
Attorney for Plaintiffs in Error.

We enter the appearance of the defendant in error in this cause and waive issue of summons.

H. P. WELSH &
WM. H. CLARK,
Att'ys for Defendant in Error.

Filed January 31, 1885.

C. J. BROWN,
Clerk Supreme Court.

5 In the District Court of Franklin County, State of Kans.

ESTHER KING, Plaintiff,
vs.
HORACE WIGGAN and ALBERT E. WIGGAN, Def'ts.

Case for Supreme Court.

Be it remembered that on the 17th day of February, 1881, the plaintiff, Esther King, filed her petition in the district court aforesaid, of which the following is a copy:

In the District Court, Sitting in and for the County of Franklin, State of Kansas.

ESTHER KING, Pl'ff,
vs.
HORACE WIGGAN & ALBERT E. WIGGAN, Def'ts. } Petition.

The said Esther King, plaintiff, complaining of said Horace Wiggan and Albert E. Wiggan, defendants, says—

That she is the legal owner and seized in fee-simple of the following-described lands and tenements, situate in the county of Franklin and State of Kansas: The south half of the northeast quarter of section twenty-three (23), township sixteen (16), range nineteen (19), containing eighty acres, more or less, and that the said plaintiff is entitled to the possession of the same, and that the said defendants unlawfully keep her out of the possession of said premises above described.

Wherefore the said Esther King, plaintiff, asks judgment against the said Horace Wiggan and Albert E. Wiggan, defendants, decreeing to her the possession of the said real estate above described and for costs.

H. P. WELSH,
Pl'ff's Attorney.

Upon said petition a publication was had against the defendants, who were non-residents, and at the May term, 1881, judgment was rendered for the plaintiff for the recovery of said premises by default. Afterward, at the September term of said court, 1883, said judgment was vacated by proper proceedings taken under section 77 of the code, and the defendants were let in to defend, they having filed their answer to said petition as follows:

In the District Court, Franklin County, State of Kansas.

ESTHER KING, Pl'ff,
vs.
6 HORACE WIGGAN & ALBERT E. WIGGAN, Def'ts.

Answer.

Now come the defendants above named and answering unto the plaintiff's petition in this action filed:

1st. Deny the same and each and every allegation thereof, except that they admit that at the beginning of this action they were in the possession of said real estate, and they aver that such possession was rightful.

2nd. They aver that they are seized in fee-simple of the lands and tenements in the petition described, to wit, the south half of the northeast quarter of section 23, township 16, range 19, in Franklin county, Kansas, and that the plaintiff hath no right, title, or interest therein.

Wherefore the defendants pray the judgment of this court establishing and declaring their said title to be paramount to the claim of said plaintiff, and that their possession is rightful, and for costs.

H. C. MECHEM,
A. W. BENSON,
Def'ts' Att'ys.

Afterward, at the January term of said court, 1884, a first trial in ejectment was had between said parties upon the issues so joined, resulting in a finding and judgment for the defendants, which judgment was, upon proper proceedings, set aside and a new trial awarded under section 599 of the code; and afterwards, at the May term of said court, 1884, to wit, May 24th, said cause came on again for trial on the said petition and answer and evidence, and, a jury being duly waived, said cause was tried by the court; and thereupon the plaintiff, to maintain the issues on her part, offered and read in evidence the census-roll of the Ottawa tribe — Indians and allotments of land made to them under the treaty of June 24, 1862, which allotment or census-roll was duly certified by the Commissioner of Indian Affairs and Secretary of the Interior of the United States under the seal of said department, said certificate bearing date March 30th, 1864; said census-roll, so far as affects the land in question, is as follows:

Family.	Persons.	Name of allottees.	Man.	Woman.	Boy.	Girl.	Age.	Subdivision.	Sec.	Town.	Range.	Acres.
55	192	Esther Wilson..	....	....	....	1	7	S. ½ N. E..	23	16	19	80

7 It was admitted by the defendants that the plaintiff is the Esther Wilson named in said allotment.

The plaintiff then rested.

And thereupon the defendants, to maintain the issues on *her* part, offered and read in evidence *in evidence* the patent issued to said Esther Wilson for said lands as follows:

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, Greeting:

Whereas, there has been deposited, in the General Land Office, a return, dated 17th March, 1864, from the Office of Indian Affairs, containing certain lands showing the selections of allotments made for the use of certain Ottawa Indians, under the treaty concluded on the 24th day of June, 1862, between the United States and the Ottawa Indians of Blanchard's Fork and Roche de Bœuf, in the State of Kansas, as ratified on the 28th day of July, 1862, which lists were duly approved by the Secretary of the Interior, under date of March 9, 1864;

And whereas, it appears from one of the lists aforesaid, that the south half of the northeast quarter of section twenty-three (23) in township sixteen south of range nineteen east of the 6th principal meridian in Kansas containing eighty acres has been designated as the allotment of Esther Wilson.

Now know ye, that the United States of America, in consideration of the premises, and pursuant to the 3rd and 7th articles of the treaty aforesaid, have given and granted, and by these presents do give and grant unto the said Esther Wilson and to her heirs, the tract of land above described: Provided, however, and these presents are upon the express condition, and with the limitation as required by the treaty aforesaid, that the said Esther Wilson shall not alienate or encumber the aforesaid tracts of land until she shall become, by the terms of said treaty a citizen of the United States; and any conveyance or encumbrance of said lands, done or suffered by said Esther Wilson, made before she shall become a citizen, shall be null and void; to have and to hold the said tracts of land, with the appurtenances, unto the said Esther Wilson and to her heirs and assigns forever, subject to the limitation and condition aforesaid.

In testimony whereof, I, Andrew Johnson, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this first day of December, in the year of our Lord one thousand eight hundred and sixty-five, and of the Independence of the United States the ninetieth.

By the President:

ANDREW JOHNSON,
By EDW. D. NEILL, *Secretary.*

S. GRANGER,
Recorder of the General Land Office.

[Great Seal of the U. S. General Land Office.]

Recorded vol. 1, page 202.

8 The defendant- then offered in evidence the following guardian's deed, which was duly recorded in the office of the register of deeds of said Franklin county October 26, 1872.

The plaintiffs, however, interposed an objection to the reading of said deed in evidence, viz., for the reason that at the time of filing of the petition of the guardian of said Esther Wilson for authority to sell the lands in plaintiff's petition mentioned and at the time of said sale of said lands by said guardian and at the time of making said deed by said guardian said lands were inalienable by reason of the restriction upon alienation as contained in the 7th article of the treaty of 1862 of the United States with the Ottawa Indians (U. S. Stat. at Large, vol. 12, p. 1237); which objection was by the court sustained and said deed excluded; to which ruling the defendants duly excepted.

The deed so offered and excluded, with the endorsement thereon, is as follows:

Know all men by these presents, that whereas, by virtue of an order of sale made and issued by the probate court of Franklin county State of Kansas, and bearing date the 23rd day of October, A. D. 1872, Benjamin Esterly, guardian of Esther Wilson a minor, on the 26th day of October A. D. 1872, sold at private sale to John Wiggan of Scott county Indiana, for the sum of sixty dollars the following-described real estate of said Esther Wilson, situate in Franklin county, State of Kansas viz: The south half of the north-east quarter of section twenty-three (23) township sixteen (16) range nineteen (19), containing eighty acres more or less, which sale was afterwards approved and confirmed by said court, and said Benjamin Esterly as such guardian was ordered to execute and deliver to said John Wiggan a deed of convevance for said premises according to the statute in such cases made and provided, all which will more fully appear by the records of said court, to which reference is hereby made. Now, therefore, I, the said Benjamin Esterly as guardian of the estate of said Esther Wilson, a minor aforesaid, in consideration of the premises, and by virtue of the power in me vested by law, and the orders of said court, do hereby give, grant, bargain, sell and convey unto the said John Wiggan, the lands and tenements aforesaid and all the right, title and interest of the said Esther Wilson therein, with all and singular the appurtenances. To have and to hold the same unto the said John Wiggan, and unto his heirs and assigns forever.

In testimony whereof the said Benjamin Esterly, guardian as aforesaid has hereunto set his hand and seal this the 26th day of October in the year of our Lord one thousand eight hundred and seventy-two.

BENJAMIN ESTERLY,
As Guardian of the Estate of Esther Wilson, a Minor.

Executed in presence of—

A. W. BENSON.

STATE OF KANSAS, } ss:
Franklin County, }

On the 26th day of October, A. D. 1872, before me, a probate judge within and for the county aforesaid, personally appeared the above-named Benjamin Esterly, to me well known to be the identical person described in and whose name is affixed to the above conveyance as grantor, and duly acknowledged the signing and sealing of the foregoing deed to be his voluntary act and deed as the guardian of said Esther Wilson, a minor.

9 Witness my signature and official seal the day and years last above written.

[Seal of Probate Court.]

J. SUMSTINE,
Probate Judge.

STATE OF KANSAS, } ss:
Franklin County, }

In the Probate Court.

And now, to wit, October 26, 1872, in open court comes Benjamin Esterly, guardian of the estate of Esther Wilson, a minor, and returns and presents to the court the foregoing deed and prays that it may be now approved by the court here, which is hereby accordingly done, to the end that it may be valid and effectual forever.

In witness whereof I have hereunto set my hand and affixed the seal of said court hereto, at Ottawa, in said county, this the 26th day of October, A. D. 1872.

[Seal of Probate Court.]

J. SUMSTINE,
Probate Judge.

Endorsed: The foregoing instrument was filed for record October 26, 1872, at one o'clock p. m., and duly recorded in Book T of Deeds, at page 443. D. Holaday, register of deeds. J. C. Willing, deputy.

The defendants then offered in evidence a deed of conveyance, with general warranty, of the same lands from John Wiggan, the grantee named in said guardian's deed, and his wife to the defendants, Horace Wiggan and Albert Wiggan, which deed was duly executed and acknowledged under date of August 13, 1880, and recorded in the office of the register of deeds of said Franklin county August 28th, 1880, said deed being now produced and offered in evidence. The plaintiff objected thereto on the same ground as stated above in the objection to the reading in evidence of said guardian's deed and because it does not appear in evidence that John Wiggan had any title or interest in said land that he could convey; which objection the court sustained and excluded said deed from evidence and refused to permit the same to be read; to which ruling the defendants duly excepted.

The defendants then rested.

No other or further evidence was given or offered on said trial, and the foregoing is all the evidence in the case received.

Thereupon, the parties having submitted said cause to the court, the court finds and decides for the plaintiff and rendered the following judgment:

ESTHER KING, Pl'ff,
vs.
HORACE WIGGAN and ALBERT E. WIGGAN, Def't-.

Be it remembered that on this 23 day of May, A. D. 1884, this cause came on to be heard before the court on the petition of the said plaintiff and the answer of said defendants (a jury being waived), and thereupon came the said plaintiff, Esther King, by H. P. Welsh, her attorney, and the said defendants, Horace Wiggan and Alfred E. Wiggan, by their attorneys, A. W. Benson and H. C. Mechem, and said parties announced themselves ready for trial, and the court, after hearing the evidence and the arguments of counsel thereon, finds that at the time of the commencement of this action the plaintiff, Esther King, was the owner of the south half of the northeast quarter of section twenty-three (23), in township sixteen (16), range nineteen (19), situated in Franklin county, Kansas, as in her petition described, and that said defendants, Horace Wiggan and Albert E. Wiggan, did at that time unlawfully keep her, the said plaintiff, out of the possession of said lands and tenements as aforesaid. It is, therefore, considered and adjudged and decreed by the court here that the said plaintiff, Esther King, have and recover of and from the said defendant-, Horace Wiggan and Albert E. Wiggan, the possession of the said real estate in the petition described, to wit, the south half of the northeast quarter of section 23, township 16, range 19, in Franklin county, Kansas, together with all the tenements and hereditaments thereunto belonging, and that the said plaintiff have a judgment against the defendants for her costs herein, taxed at $8—, and that execution issue.

Thereupon, on the same day, the defendants filed their motion for a new trial, which motion is as follows:

In the District Court, Franklin County, *ss:*

ESTHER KING, Plaintiff,
vs.
HORACE WIGGAN and ALBERT E. WIGGAN, Def'ts.

The defendants above named move the court to set aside the findings and decision of the court herein and to grant a new trial hereof for the following reasons:

1. That said decision is contrary to law.
2. That said decision is not supported by the evidence.
3. Error of law occurring at the trial and duly excepted to by these defendants.

4. Because the court erred in excluding from evidence the title deed offered in evidence by the defendants.

H. C. MECHEM,
A. W. BENSON,
Defendants' Attorneys.

And said motion coming on to be heard and being argued, the court overruled and denied the same; to which ruling the defendants duly excepted, and the court then entered the following order:

ESTHER KING, Plaintiff,
vs.
HORACE WIGGAN and ALBERT E. WIGGAN, Def'ts.

Now, this cause coming on further to be heard on the motion of the defendants to set aside the findings and decision herein and to grant a new trial hereof, the court, having heard the argument of counsel for the respective parties and considered the same, doth overrule said motion and refuse to grant a new trial of this action; to which ruling and decision the said defendants duly excepted.

And now, on this 27th day of May, A. D. 1884, and at the same term of said court at which said trial was had, the defendants present here the foregoing case made for the supreme court, and pray that it may be signed and attested accordingly; and the plaintiffs now here consenting and agreeing thereto, and said case appearing to be true and correct, it is accordingly settled, signed, and certified as a true case herein for the supreme court, and attested by the clerk, by order of the judge, this the day last above written.

N. T. STE 'HENS,
Dist. Judge.

Attest: E. H. PARAMORE, *Clerk.* [SEAL.]

The within case served on me this 27th day of May, 1884, and, finding the same true and correct, I consent that it be signed and settled by the judge and attested as a true case.

H. P. WELSH,
WM. H. CLARK,
Att'ys for Pl'ff.

11 2749. Esther King *vs.* Horace Wiggan *et al.* Case for supreme court. Filed May 27th, 1884. E. H. Paramore, clerk.

Horace Wiggan *et al. vs.* Esther King, def't. 3560. Petition and case made. H. C. Mechem, pl'ffs' att'y. Filed January 31, 1885. C. J. Brown, clerk supreme court.

12 And afterwards, to wit, on the 6th day of January, 1886, the same being one of the regular judicial days of the January term, A. D. 1886, before the supreme court of the State of Kansas, in session at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice;

Honorable Daniel M. Valentine and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

HORACE WIGGAN *et al.*, Plaintiffs in Error,
—
ESTHER KING, Defendant in Error.

This cause comes on to be heard on petition in error and the transcript of the record of the district court of Franklin county; and thereupon the cause was submitted on briefs of counsel for both parties herein and taken under advisement by the court.

13 And afterwards and on, to wit, the 4th day of June, 1886, the same being one of the regular judicial days of the January term, A. D. 1886, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

HORACE WIGGAN and ALBERT E. WIGGAN, Plaintiffs in Error,
vs.
ESTHER KING, Defendant in Error.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be affirmed with costs, and hereof let execution issue.

Opinion *per curiam*.

14 And also, on the 6th day of June, A. D. 1886, the same being one of the regular judicial days of the supreme court of the State of Kansas, there was filed in the office of the clerk of said court the opinion of the court in said cause, a copy of which is hereunto annexed and is in the words and figures as follows, to wit:

15 HORACE WIGGIN and ALBERT E. WIGGIN
vs.
ESTHER KING. } 3560.

Error from Franklin county. Affirmed.

Opinion per Curiam.

This is an action in the nature of ejectment brought by Esther King against Horace Wiggin and Albert E. Wiggin for the recovery of an eighty-acre tract of land situated in Franklin county, Kansas. The trial having resulted in favor of the plaintiff, the defendants, as plaintiffs in error, bring the case here for review. Esther King was an Ottawa Indian, and the land in controversy, being a part of

the Ottawa reservation, was allotted to her under the provisions of the treaty concluded on the 24th day of June, 1862, and upon this allotment her right of recovery was based. The plaintiffs in error claim the land under a guardian's deed which purported to be executed by the guardian of Esther King in October, 1872, before she became of full age. The question presented for determination was whether, under the restrictions of the treaty of 1862 and the treaty of 1867, the lands allotted to Esther King could be alienated while she was yet a minor. The court answered this question in the negative and excluded the guardian's deed from its consideration. The case, as will be seen, falls within the decision of Campbell *vs.* Paramore, 17 Kas., 639. The provisions of the treaties of 1862 and of 1867 relating to restrictions upon the alienation of land
16 were there considered and interpreted, and it was held that the restrictions upon the sale of land allotted to minors were not removed until they arrived at full age. If the contention of the plaintiffs in error that the Ottawa Indians, under the terms of the treaty of 1862, became citizens before the treaty of 1867 took effect was upheld, it would result in nullifying the treaty of 1867, because the President and Senate are not authorized to enter into a treaty with citizens of the United States. If we are in error in the view which has been taken of the treaties, the plaintiff in error is not without remedy, as the question is one which may be presented to the Supreme Court of the United States for its decision, but we are disposed to follow the ruling in the case cited, and therefore the judgment of the district court will be affirmed.

17 And also, to wit, on the 6th day of May, 1892, the same being one of the regular judicial days of the January term, A. D. 1891, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

HORACE WIGGAN and ALBERT E. WIGGAN, Plaintiffs in Error,
vs.
ESTHER KING, Defendant in Error.

Now, to wit, this 6th day of May, 1891, come the plaintiffs in error in this cause, by H. C. Mechem, their attorney, and suggested to the court that the defendant in error had departed this life since the decision of this cause, leaving as her heirs-at-law Alexander Conolly, her husband, and John King, her only child, and thereupon moved that the cause be revived in the names of said heirs. It is thereupon by the court here now ordered and adjudged that this action be, and it is hereby, revived against and in the name of Alexander Conolly and John King, defendants in error.

18 And also, on, to wit, the 20t- day of June, 1892, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation in the above-entitled cause, the original of which, with the endorsements thereon, is hereunto attached and is in words and figures as follows, to wit:

19 The United States of America to Alexander Conolly and John King:

You are hereby admonished to appear in the Supreme Court of the United States, at Washington, D. C., thirty (30) days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the supreme court of Kansas, wherein A. E. Wiggin is plaintiff in error and you are defendants in error, to show cause, if there be any, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Albert H. Horton, the chief justice of the supreme court of Kansas, this 26th day of May, 1892.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of Kansas.

Filed Jun- 20, 1892.

C. J. BROWN,
Clerk Sup. Court.

20 STATE OF KANSAS, } *ss:*
Douglas County, }

I, Simpson Hollister, do solemnly swear that I served the within writ of error on said Jno. King by delivering a true copy thereof to him this 20th day of June, 1892.

SIMPSON HOLLISTER.

Subscribed & sworn to before me this 21st day of June, 1892.

[Seal James Brooks, Notary Public, Douglas Co., Kansas.]

JAMES BROOKS,
Notary Public.

My commission expires Sep. 6, 1893.

TERRITORY OF OKLAHOMA, } *ss:*
County of ——, }

S. L. Patrick, being duly sworn, says that he served the within writ upon Alexander Conolly on the 8th day of June, 1892, by delivering to him a duly certified copy thereof.

SAMUEL L. PATRICK.

Subscribed and sworn to before me this 8th day of June, 1892.

{Seal Lee Patrick, United States Commissioner, Territory of Oklahoma.}

LEE PATRICK,
U. S. Commissioner.

21 3560.

And afterwards, on, to wit, the 20th day of June, 1892, there was filed in the office of the clerk of the supreme court of the State of Kansas a writ of error in the above-entitled cause, the original of which is hereunto attached and is in words and figures as follows, to wit:

22 THE UNITED STATES OF AMERICA:

The President to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the January term, 1886, thereof, between Horace Wiggin and A. E. Wiggin, plaintiffs in error, and Esther King, defendant in error, a manifest error hath happened, to the great damage of the said Horace Wiggin and A. E. Wiggin, as by the complaint of the said Horace Wiggin and A. E. Wiggin appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings at said court and filed in the office of the clerk thereof on or before the — day of June, 1892, to the end that, the same being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 26th day of May, 1892.

23 Issued at office, in Topeka, Kansas, with the seal of the circuit court of the United States for the district of Kansas, and dated as aforesaid.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT,
Clerk of the U. S. Circuit Court.

Allowed by me this 26th day of May, 1892.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of Kansas.

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of the supreme court of Kansas.

——— ———,
Clerk of the Supreme Court of Kansas.

24 And also, on, to wit, the 20th day of June, 1892, there was filed in the office of the clerk of the supreme court of the State of Kansas an appeal bond in the above-entitled cause; which said bond is in words and figures as follows, to wit:

Bond for Costs.

Know all men by these presents that we, A. E. Wiggan, as principal, and John H. Wiggan, as surety, are held and firmly bound unto the clerk of the Supreme Court of the United States in the penal sum of three hundred (300) dollars; for the payment of which sum, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, firmly. The condition of this obligation is such that whereas the said A. E. Wiggan has filed in the said Supreme Court — a cause wherein he is appellant and Alexander Conolly and John King are appellees, now, if the said appellant shall duly prosecute said appeal and shall pay all costs that may be adjudged against him on the determination of said cause, then this bond shall be void; otherwise of full force and effect.

Witness our hands this — day of June, 1892.

A. E. WIGGAN.
JOHN H. WIGGAN.

Approved this 20th day of June, 1892.

ALBERT H. HORTON,
Chief Justice.

Filed June 20th, 1892.

C. J. BROWN,
Clerk Supreme Court.

25 In the Supreme Court of the State of Kansas.

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct, and complete transcript of all pleadings and papers filed and of all proceedings had in the above-entitled cause as the same remain on file and of record in my office.

Witness my hand and the seal of the supreme court affixed hereto, at my office, in Topeka, this 20th day of June, 1892.

[Seal Supreme Court, State of Kansas.]

C. J. BROWN,
Clerk Supreme Court.

Endorsed on cover: Case No. 15,291. Kansas supreme court. Term No., 225. Horace Wiggin and A. E. Wiggin, plaintiffs in error, *vs.* Esther King. Filed April 8th, 1893.

Office Supreme Court U. S.
FILED.
SEP 9 1895
JAMES H. McKENNEY,
CLERK.

....IN THE....

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

A. E. WIGGIN,
Plaintiff in Error.

vs.

ALEXANDER CONOLLY,
AND JOHN KING,
Defendants in Error.

No. 225.

BRIEF FOR PLAINTIFF IN ERROR.

BEN T. DUVAL,
Attorney for Plaintiff in Error.

H. C. MECHEM,
Counsel.

In witness whereof I hereto subscribe my name and affix the seal of the supreme court of Kansas.

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Clerk of the Supreme Court of Kansas.

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Witness our hands this — day of June, 1892.

A. E. WIGGAN.
JOHN H. WIGGAN.

Approved this 20th day of June, 1892.

ALBERT H. HORTON,
Chief Justice.

Filed June 20th, 1892.

C. J. BROWN,
Clerk Supreme Court.

25 In the Supreme Court of the State of Kansas.

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct, and complete transcript of all pleadings and papers filed and of all proceedings had in the above-entitled cause as the same remain on file and of record in my office.

Witness my hand and the seal of the supreme court affixed hereto, at my office, in Topeka, this 20th day of June, 1892.

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AND JOHN KING,
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BRIEF FOR PLAINTIFF IN ERROR.

ABSTRACT.

On February 17th, 1881 Esther King began an action of ejectment in the District Court of Franklin County Kansas against Horace Wiggin and A. E. Wiggin (plaintiff in error here) to recover 80 acres of

land in that County, of which she claimed to be the owner in fee simple. The defendants admitted their possession, denied her ownership and asserted that they were the owners in fee of the land demanded. The cause coming on for final trial May 24, 1884, the plaintiff offered a properly authenticated copy of the census roll of the Ottawa Tribe of Indians and allotments of lands made to said Indians under the Treaty between the said Tribe and the United States, June 24, 1862, from which it appeared that the land in controversy had been allotted to Esther Wilson (a girl 7 years of age) as one of said Tribe. It being admitted by defendants that the plaintiff was the Esther Wilson designated in this allottment, plaintiff rested. The defendants then introduced a patent for the land in question duly issued by the government to the plaintiff and dated December 1, 1865, which patent recited the allotment aforesaid and the restrictions upon alienation contained in that Treaty and granted the land to her and her heirs and assign forever subject to the limitation and she should not alienate or encumber it before she should by the terms of the Treaty of 1862 become a citizen of the United States. Defendants then offered in evidence a deed made by Benjamin Esterly as guardian of the plaintiff to Jno.

Wiggin for the land in question to which plaintiff ob-objected "for the reason that at the time of filing of

the petition of the guardian of said Esther Wilson for authority to sell the lands in plaintiff's petition mentioned and at the time of said sale of said lands by said guardian and at the time of making said deed by said guardian said lands were inalineable by reason of the restrictions upon alienation as contained in the 7th article of the Treaty of 1862 of the United States with the Ottawa Indians," which objection was sustained and the deed excluded over the exception of defendants. The defendants then offered in evidence a deed of general warranty dated Aug. 15, 1880, made by Jno. Wiggin to the defendants conveying the land in question. To which plaintiff objected on the same grounds as to the guardians deed aforesaid and also because it did not appear in evidence that Jno. Wiggin had any interest or title in the land which he could convey. This objection was sustained and the deed excluded over the exception of the defendants. No other evidence was offered or given and the cause being submitted to the court judgment was rendered that the plaintiff at the time of commencing her action was the owner in fee simple of the land claimed, that the defendants unlawfully kept her out of possession thereof and that she should recover the possession from them.

The defendants moved for a new trial on the grounds of improper exclusion of evidence and erroneous judgment, which motion being overruled exception was taken and the case properly appealed to the

Supreme Court of the State, alleging error in the exclusion of evidence and in the final judgment. Being submitted in that court on its merits, it was affirmed June 6, 1886, the court holding that the exclusion of the guardian's deed was correct because the restrictions upon the alienation of the allotment to plaintiff were not removed until she became of age. (35 Kas. 410) Esther King having deceased, subsequently the cause was revived in said supreme Court against her husband Alexander Conolly and her only child Jno. King. May 26, 1892, the Chief Justice of said court allowed a writ of error in the cause to this court and issued a citation to said Conolly and King which being duly served the record was filed in this court Apr. 9, 1893. The time having elapsed within which an adult party could appeal the cause, the case is prosecuted here by A. E. Wiggin alone, he having been, as shown by the verified assignment of errors, a minor until within less than two years of June 20, 1892.

SPECIFICATION OF ERRORS.

The plaintiff in error insists that the judgment of the Supreme Court of Kansas was erroneous, (1) in holding that the land in controversy was inalienable under the Treaties of 1862 and 1867 between the United States and the Ottawa Indians, (2nd) in approving the ruling of the trial court excluding the

guardians deed and (3) in affirming the judgment.

ARGUMENT.

A brief resume of the Treaties under which the government parted with the title to this land and vested it in Esther Wilson, will aid us in the argument. The Treaty of June 24, 1862, (U. S. Gen. Stat. Vol. 12, p. 1237) provided in Art. I, that

> "The Ottawa Indians of United Bands of Blanchards Fork and of the Roche De Boeuf, having become sufficiently advanced in civilization, and being desirous to become citizens of the United States, it is hereby agreed and stipulated that their organization, and their relation with the United States, as an Indian Tribe, shall be dissolved and terminated at the expiration of five years from the ratification of this treaty; and from and after that time the said Ottawas, each and every one of them, shall be deemed and declared to be citizens of the United States, to all intents and purposes, and shall be entitled to all rights, privileges, and immunities of such citizens, and shall in all respects, be subject to the laws of the United States, and of the State or States therein which they may reside."

The remaining Articles provide for the payment to the Indians of the funds held for them by the government, for the allotment to each head of a family of 160 acres (if practicable to include the improvements of the allottee) and to all other members of 80 ocres, the gift of a large quantity of land to the Ottawa University and the sale under regulations of all

the other land contained in their Reserve. Art. 3 provides that when survey and allotment are completed the Secretary of the Interior shall issue patents in fee simple to each individual Indian for his or her allotment.

Art. 7 provides "proper patents by the United States shall be issued to each individual member of the tribe for the land selected and allotted to them, in which it shall be stipulated that no Indian, except as herein provided, to whom the same may be issued, shall alienate or encumber the land allotted to him or her in any manner, until they shall, by the terms of this treaty, become a citizen of the United States. and, any conveyance or encumbrance of said lands, done or suffered, except as aforesaid, by any Ottawa Indian, of the lands allotted to him or her, made before they shall become a citizen, shall be null and void, and 40 acres, including the houses and improvements of the allottee, shall be inalienable during the natural life time of the party receiving the title."

Art. 8 provides among other things that the money of minors "may in all cases be paid to guardians appointed by the local laws."

The treaty of 1867 (U. S. Gen. Stat. V. 15, p. 513) was made jointly with several tribes and begins: "Whereas it is desirable that arrangements should be made by which portions of certain tribes, parties hereto, now residing in Kansas, should be enabled to remove to other lands in the Indian country South of that State, while other portions of said tribes desire to dissolve their tribal relations and become citizens."

Art. 16 provides for a sale of certain lands in the Indian Territory to the Ottawas to be paid for with the tribal funds in the hands of the government and

payment of the balance of said funds to them per capita."

"Art. 17. The provisions of the Ottawa Treaty of 1892 under which all the tribe were to become citizens upon the 16th July, 1867 are hereby extended for 2 years or until July 16, 1869; but at any time previous to that date any member of the tribe may appear before the United States District Court for Kansas and declare his intention ot become a citizen, when he shall receive a certificate of citizenship which shall include his family, and thereafter be disconnected with the tribe, and shall be entitled to his proportion of the tribal funds; and all who shall not have made such declaration previous to the last mentioned date shall be still considered members of the tribe. In order to enable the tribe to dispose of their property in Kansas, and remove to their new homes and establish themselves thereon patent in fee simple shall be given to the heads of families, and to all who have come of age among the allottees under the treaties of 1862, so that they may sell their land without restriction, but the said lands shall remain exempt from taxation so long as they may be retained by members of the tribe, down to July 16, 1869."

It will be observed that there were two restrictive clauses in the VII Article of the Treaty of 1862 viz. (1) the *whole* allotment was inalienable until the allottee became a citizen of the United States, and, (2) 40 acres including the houses and improvements of the allottee were inalienable during the life of the allottee. The first restriction is the only one which was invoked by the plaintiff below and is the only one which the record imperatively requires to be consid-

ered here. The guardian's deed which was excluded purported to pass the whole allotment of 80 acres. If the restriction upon the alienation of the whole 80 until Esther Wilson became a citizen had ceased or been removed prior to the proceedings in the Probate Court but her inability to dispose of 40 acres remained, the proceedings in the Probate Court were valid, and the guardian's deed made in pursuance was effectual, to pass the title to 40 acres of the land which it described. That being the case it was error to exclude the deed. It should have been admitted and its application restricted to the part which it was efficacious to convey. If the court erred in excluding this deed the case must be reversed and a new trial result whether the restriction as to 40 acres of the land could or could not have been successfully invoked. We shall proceed, therefore, to argue as to the sole question in the case whether the restriction against alienation of any of the allotment until the allottee became a citizen of the United States was still in force when the Probate Court of Franklin County assumed jurisdiction over this allotment and the person of its owner.

First the allottees became citizens July 16th 1867.

We base this proposition upon the fact that the treaty of 1867-68, relied upon to prevent that result, did not accomplish it, not having been concluded until the date fixed by the first treaty had arrived, the citizenship of the Indians had become vested and the reserve had passed under the jurisdiction of the State of Kansas, beyond their control or that of the National Government to alter, without the assent of the State.

The Commissioner, on the part of the United States, and the representatives of the Indians met and agreed upon a treaty in February, 1867. That proposed treaty never became a law. In June, 1868, the Senate suggested certain changes and amendments which would make it satisfactory to them, which amendments were accepted by the Indians, September, 30, 1868, and the treaty proclaimed October 14, following.

When did it take effect?

a. The general rule is that treaties take effect as to the contracting powers from the date of signing or execution, by relation back from the time of ratification.

When is a treaty made or executed by the United States?

We assert that under the constitution of this na-

tion the power to make a treaty is vested in the President and the Senate co-ordinately, and that no treaty is executed in any sense until the Senate has acted upon it. The language of the clause conferring this authority is, "The President shall make treaties by and with the advice and consent of the Senate." President Jackson, in his message to Congress of December 21, 1836, speaks of the treaty-making power "given to the President and Senate." The commissioner of the executive department, while he represents the President, and consequently it might be claimed that the subsequent ratification of his work by the executive, would by relation from that date carry back the effect of the treaty to the time when such representative signed it, does not represent the Senate. He is not appointed by them; he is not responsible to them, and they are bound by no considerations, either legal or moral, to approve his stipulations. Their power is not that of mere acquiescense in the doings of the executive department; not a veto, but a right; not, in the first instance, to set on foot negotiations, but when that is done, to take an active part in them, to suggest alterations by erasures, interlineation or amendment. The authority which can amend is an active, not a passive one.

Judge Story, after speaking of the doubts as to the correct exposition of this provision of the constitution,

whether it meant that the agency of the Senate was admissible previous to the negotiations, or was limited to advice and consent afterwards, says: "The practical expositions assumed on the first occasion, which seems to have occurred in President Washington's administration, was—that the Senate might advise as well before as after the formation of a treaty." As the field of foreign relations widened, and the purely legislative duties of the Senate became more absorbing, the other course was necessarily adopted in the detail of practical treaty-making. As to the scope of their agency the same high authority says: "The Senate may wholly reject the treaty, or advise and consent to the ratification of part of the articles, rejecting others or recommend additional and explanatory artieles;" and, he then goes on to say what is peculiarly applicable to the question we are now considing: 'In the event of a partial ratification, the treaty does not become the law of the land until the President and the foreign sovereign have each consented to the modification proposed by the Senate." Story on the Const., vol. 3, page 371. The same language is used as to the appointment of the federal officiary. It is to be done by the President, "by and with the advice and consent of the Senate;" yet, it is universally admitted that such appointees become officers only after the action of the Senate. Pomeroy's Con-

stitutional law, page 429.

If the Senate is a party in this sense to treaties, they certainly cannot be said to be signed or executed until after the action of the Senate is had. And if this be so, the treaty of 1867-8 was not signed and did not take effect until June, 1868, at the very earliest.

b. But if it be held that the right of the Senate is merely that of ratification, and that when they act the treaty which they approve takes effect from the day of signature by the representatives of the negotiating powers, still we contend that this treaty did not take effect until after July 16, 1867, because the Indians did not assent to certain parts of it, which were changed by the Senate until September, 1868. The interpretation and effect of treaties between the parties is governed by the same rules or canons of construction which obtain in the construction of contracts. Assent to make a treaty is necessary and just the assent necessary to constitute a valid contract. "The assent must comprehend the whole of the proposition; it must be equal to its extent and provisions, and it must not qualify them by any new matter." Pars. on Con. 1, book 2, chap. 6, page 476. The same author goes on to speak of the cases where the answer, either in words or effect, departs from the proposition, or varies the terms of the offer, and says: "In these cases there is no assent, and no contract."

Here the Indians made a proposal. If the Senate had advised and consented to its ratification, it would have been complete, but they did not do so. They proposed changes, and thereby rejected the offer. Therefore, as to the Indians, no treaty was made until by their acceptance the necessary assent was given.

c. But there is a still more imperative consideration. It is an established canon of treaty construction, that a treaty is an entirety; that the whole promised on the one part is agreed to in consideration of the entire promise upon the other part, and that a breach of any article of a treaty is a violation of the whole. Vattel, book 2, chapter 13, section 202; book 4, chap. 4, sec. 47; Wheaton Int. Law (8 Fed.) sec. 550. This treaty must take its date from the time when it was entered into as a whole. The amendments proposed by the Senate could not take effect until they were proposed. Hence, a part of the treaty did not become operative until June, 1868, and not until then did the treaty assume its condition as proclaimed. The language of the treaty itself adds force to this argument by showing the rule to be that which is here asserted, in Article 40, where they provide,

> "If any amendments shall be made to the treaty by the "Senate, the assent only of the tribe interested shall be "obtained, and if not obtained, the remainder of the

"treaty not effected by such amendments shall neverthe-
"less take effect."

Of course, the clause, "the remainer of the treaty not affected by the amendments," refers to the stipulation which it contains with other tribes, and the proviso was made in view of the contingency which did arise, and the rule which would have invalidated the entire treaty.

d. But if the treaty as between the United States and the Indians, took effect by relation at the time of the first negotiations (Feb. 1867), still the power of the State over these lands was not divested, because treaties are not binding upon third persons from the date of their signing, but from that of their *publication;* which, in this country, is the time of the proclamation. Vattel says, "On the publication, the treaty becomes a law to the subjects, and they are therefore bound to conform to the regulations therein stipulated."

Wheaton, Kent and Story all concur in this rule as to the time when treaties take effect, as to the subjects of the contracting powers.

Now, in this instance, the party affected by this treaty is the sovereign State of Kansas, without whose consent, no treaty affecting her boundaries or jurisdiction can be made. By the treaty of 1862, this reserve was added to her territory, and these individ-

uals acquired rights as her citizens, which they could thenceforth call upon her to maintain and protect. The jurisdiction once attached, could not be divested without her consent, and this was not asked for, in any sense, until the publication of the treaty. From July, 16, 1867, until October 14, 1868, the State of Kansas undoubtedly had jurisdiction of these lands, with all the power over them which she had over any other land within her bounds. Can it be, that without her assent or concurrence, that jurisdiction was divested and these people taken out of her citizenship and relieved of all responsibility to her? We think no one will be found to assert so bold a proposition. As to the State of Kansas, this treaty could not and did not take effect until it was published, and could not before that time, have affected her powers. The result claimed for it, could not have been reached, because the general government cannot, in the exercise of any constitutional prerogative, take either property or person from the jurisdiction of the State, when once that jurisdiction for the purposes of government, has become attached.

What was the status of these lands between February, '67 and October '68? Let us suppose that in that interval the Probate Court of Franklin County, had appointed a guardian for Esther King, and sold her lands. Will it be contended by any one that the

act would have been without jurisdiction and void? If not, then the power of the State, once vested has been, without her consent, taken from her by a contract made between her citizens and the Federal Government.

In the negotiations between the United States and Great Britain, in 1837, the United States declared that they had no power to cede any part of the territory of Maine without her consent, and declined to make the treaty finally made in 1842, without the presence and assent of commissioners on the part of the states affected by it.

If there is no power in the Federal Government to make a treaty, with a foreign sovereign, which shall cede away the jurisdictional rights of the State, then *a fortiori* there can be no power to do so in treaty with those, who owe allegiance to the State, as her citizens. What ever view of the nature of the Government, may be entertained whether the liberal construction of the school so ably represented by Marshall and Webster, the exact opposite so forcibly demonstrated by Calhoun, or the compromise doctrine held by such statesmen as Madison, and such jurists as Taney; none of them will deny to the State the control of her property and citizens for all purposes of local and municipal government. The Federal Government may abnegate its claims upon both these for

its purposes, but it cannot by so doing deprive the State, within whose boundaries they may reside, from her control over them. To admit this doctrine, is to admit the power of the Federal Government to destroy the autonomy of the states entirely, for there is no such thing as placing limits to the results of such a power, carried out, as it might be at any time, by those who control the general government. That this is the true exposition of the respective rights of the general government and the states, observe the contemporaneous construction put upon it by Congress, in the formation of territories and states, expressly reserving dominion over such Indian reserves asmay lie within the exterior boundaries allotted to the territory or state.

That this view should have been applied in this case, by the court, of whose action we complain, is past denial when we consider its declarations upon the subject. In Baldwin v. Squires 20 Kas. 280 that court had held that a conveyance made, after July 16, 1867, and before the ratification of the Treaty of 67-8 by one who was not able to convey *except for the power conferred upon him July 16, 1867 by the first treaty*, was valid, saying, "The five years had passed, and Masko was a citizen, and subject to the laws of this State at the time of the conveyance. The treaty of 1868 was not ratified, and of course its subsequent

ratification could not avoid prior conveyance."

It will thus be seen that the court in deciding the cause at bar not only did not pursue a settled line of adjudication but actually departed from its previous deliberate construction of this treaty.

If, however, this court should hold otherwise upon the question when the Treaty of 1867 took effect and shall determine that these Indians did not become citizens July 16, 1867, then we insist further.

SECOND,

THAT ALL THE ALLOTTES BECAME CITIZENS OF THE UNITED STATES ON IF NOT BEFORE, JULY, 16, 1869.

That they would have become citizens two years before but for the second Treaty is undeniable. Concede its capacity to affect that result and by retroaction prevent it and it becomes nccessary to consider to what extent the latter Treaty annulled, altered or modified the former.

The first Treaty contemplated the complete dissolution of the tribal relation and the absorption of these Indians in our national and state citizenship. The second Treaty discloses that a part of the Ottawas had changed their minds and wished to retain the form of a tribal organization and live in a body in the Indian Territory. Now the fallacy upon which

the trial court and the reviewing court both proceeded was in regarding this determination with reference to retaining the tribal relation as including the further determination *not to become citizens of the United States.* The provisions of the first Treaty on the subject of citizenship are direct, unequivocal and unqualified and an alteration in express terms cannot be found in the second Treaty. It nowhere says "they shall not become citizens." If the provision was changed it must be found by inference or implication. Repeal by implication is never favored.

"The implication must be necessary." There must be a positive repugnancy between the provisions of the new law and those of the old." (Wood v. U. S. 16 Pet 342; U. S. v. Tynen 11 Wall. 88; State v. Stoll 17 id 425.) The most diligent scrutiny of the later Treaty will not disclose any such "positive repugnancy between" its provisions and those of the former. The provisions of the former Treaty, as to becoming citizens, were" extended for two years or until July 18 1869:" That smacks of delay but not of repeal. If any conclusion is warranted it would be steadfast ness in the original purpose. What does extend mean in such a connection? Nothing but the postponement of an intended event. When the new time arrives the event will take place as if no postponement had been made. If the sentence had stopped here no oth-

er conclusion but mere postponement and therefore ultimate citizenship, would be possible. Continuing "but at any time previous to that date any member of the tribe may appear before the U. S. District Court of Kansas and declare his intention to become a citizen," etc., only adds force to the construction for which we contend. It is in effeet saying, "you will become citizens in any event two years hence but if for personal reasons you desire to do so sooner, a way is provided." The remainder of the clause "and all who have not made such declaration" does not refer to citizenship but to the decision of the individual Indian whether he will remain a member of the tribe. The only way to extract any weight from this proviso is by contending that a person may not be at one and the same time a citizen of the United States and an Indian with rights to tribal property, (i e) with Indian rights. This dual condition is recognized by Federal legislation (24 Stat. at L. 390 and Sec. 43 of the act creating Territory of Okla. and providing for courts in Indian Ty.) and by this court (Elk V. Wilkins 112 U. S. 94.) As the court below rested its affirmance of the judgment solely upon the previous case of Campbell V. Paramore 17 Kas. 639, we address ourselves to the character of that opinion. The case was tried upon an agreed state of facts which is somewhat peculiar for that which *it does not contain*.. The only allusion to the defendants is the admission that

they are in possession of the land and have improved it. Whether they make any claim to the title and if so, upon what ground is not dieclosed. The case was in our judgment prepared and submitted for the single purpose of obtaining a decision that the Ottawas who were minors when the treaty of 67-8 took effect could sell their lands when they arrived at majority. If that was its purpose it was accomplished, and the decision was correct. The facts were not presented which arise in this case and all that was said in that opinion intimating that the restrictions upon alienation were not removed from the minor allottees *until they became of full age*, was absolute obiter dictum. Since, however, the court has seen fit to adopt that obiter dictum, we are called upon to point out its manifest errors and its inconsistency with previous and subsequent decisions in real cases contested upon their merits. It begins by declaring that the Treaty of 67-8 "provided for issuing patents to those only and removing the restrictions from those only who were at the time of full ages." but the succeeding sentence informs us that when one not "of full age" arrived at majority, "then said restrictions were removed." Thus it is at one and the same time announced that the treaty removed the restrictions from a *part only* of the tribe and that it removed them from *all* of the tribe. The trouble with the court is that it

constantly confounded a qualified estate with a personal disability of the owner. All the other minors whose lands were in Franklin County were just as incompetent as Esther Wilson to convey them and no more, but all of them held a fee simple estate in their lands. Her inability and that of Shah-na-nib-na-se, to sell before majority was purely a matter of years and not blood. The court erred also in the weight it gave to a patent or the issue of a patent for lands allotted to Indians by treaty. The title passed absolutely by the force of the treaty and the allotment made and published thereunder. The patent was merely convenient recordable evidence of the title, nothing more. This court held in Libbey V. Clark 118 U. S. 250 that the title which the Indians received under the first treaty was a fee simple with a time limit upon alienation. The limitation fell off July 16, 1869, and there was no necessity for any second patent such as the court assumed had been issued to Shah-nib-na-se, and no such second patents were ever issued by the Indian Department. The court was as unfortunate when it strayed into the realm of Lindley Murray as in its legal speculations upon the meaning of the treaty. The provision that removed the restrictions from "the heads of families and those who have come of age among the allottees etc. only" cannot be grammatically made to mean any such thing as the court says.

The perfect "have come of age" must be referred to the time when it was spoken (i e when the treaty was made) and not to such various and indefinite dates as the time when numerous minors would attain their majority. The form of the verb (present perfect) "denotes an event or condition fully completed at the time of speaking." From this decision, evidently born of the improvidence of haste. we appeal to other cases where due deliberation brought forth proper fruits. In Clark v. Libby 19 Kas. 634 the court held that Wm. Hurr an adult allottee under the treaty of 62 became a citizen *by virtue of that treaty*. As there was nothing in the findings of fact or record to warrant the assumption that Hurr became a citizen by applying to the Federal Court in Kas. or that he did not go the Territory with the tribe, this opinion concluded the court from denying that all the Ottawas became citizens on July 16, 1869, if not sooner. Now a minor can become a citizen as well as an adult and Esther Wilson became such citizen at least not later than July 16, '69. But in the later case of Baldwin V. Squires supra, this conclusion was affirmed and emphasized if indeed it was not carried to an unwarrantable length. There it was held that the conveyance of Masko, who was 15 years old when the treaty census of '62 was made (July 16-19, 1862), executed July 29, 1867, passed a title. Now, as he was

but 20 years of age when that conveyance was made it follows that the court considered that citizenship and not age was the test of ability to convey, and that Masko, although disabled by the laws of Kas., from conveying his real estate was able to do so by the express terms of the treaty which made the land his. Whether that was a justifiable construction we need not discuss, as we cite it here expressly to show that in alater and better considered case the decision in Campbell V. Paramore was absolutely ignored by the court which rendered it. We insist that there is but one sensible construction of these treaties and that is the one which holds that all the Indians who had not before become citizens, became such July 16, 1869, irrespective of age, and that they and their property in the State became in every respect subject to the laws of the State. No defense has been or can be made of the construction which leaves a large portion of these Indians in a state of animated suspension for an indefinite time. Esther Wilson might have starved to death for want of the means to purchase the necessities of life while the owner in fee simple, of valuable land in Kansas. The provisions of law by which her land was sold for her benefit by her guardian may have afforded her the only escape from absolute want. The Interior Department, in the practical construction and application of this treaty, has uniformly

held that the Ottawas became citizens July 16, 1869 The Secretary of that Department, passing upon the question how the undisbursed tribal fund should be treated, held on March 10, 1871, that the Ottawa Indians became citizens July 16, 1869, and on March 9, 1872, the same Department reaffirmed that decision in an appeal prosecuted by the Shawnees from a decision of the Commissioner of Indian Affairs. We submit that this construction of the treaty by the Executive Department of the government, is entitled to great (if not controlling) weight as the authoritative exposition by a co-ordinate branch of the Government of a treaty made under its special supervision. "In reference to all matters of this kind, it is the rule of this court to follow the action of the Executive and other political departments of the government, whose more special duty it is to determine such affairs." (U. S. V Holliday 3 Wall 407.) There has also been judicial construction to the same effect by the District Court of Kansas, which in March, 1883, in a settlement of the Trustees of Ottawa University with the Ottawas,